tions, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning. *Nielsen* v. *Johnson*, 279 U.S. 47, 52; compare *United States* v. *Texas*, 162 U.S. 1; *Terrace* v. *Thompson*, 263 U.S. 197, 223; *Cook* v. *United States*, 288 U.S. 102. See Yü, The Interpretation of Treaties, pp. 138, 192; Chang, The Interpretation of Treaties, p. 59 *et seq.* But that rule has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body. There is no allegation that the alleged agreement between the negotiators made in 1922 was called to the attention of Congress in 1928 when enacting the Act; nor that it was called to the attention of the legislatures of the several States.

As Arizona has failed to show that the testimony which she seeks to have perpetuated could conceivably be material or competent evidence bearing upon the construction to be given Article III, Paragraph (b), in any action which may hereafter be brought, the motion for leave to file the bill should be denied. We have no occasion to determine whether leave to file the bill should be denied also because the United States was not made a party and has not consented to be sued.

Leave to file bill denied.

OHIO *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE, ET AL.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

No. —, original. Return to Rule to Show Cause Presented April 30, 1934.—Decided May 21, 1934.

1. The instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are exempt from taxation by the United States. P. 368.

2. The immunity of the States from federal taxation, under the above-stated rule, is limited to those agencies which are of a governmental character. P. 368.
3. Whenever a State engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the State, is not immune from the federal taxing power. P. 368.
4. Where a State engages in the business of distributing and selling intoxicating liquors, though pursuant to a legislative enactment providing a system of liquor control, it is not immune from the federal tax imposed on liquor dealers by R.S., § 3244. Following *South Carolina* v. *United States,* 199 U.S. 437. P. 368.
5. Though the Eighteenth Amendment outlawed the liquor traffic, it did not have the effect of converting what had always been a private activity into a governmental function. P. 369.
6. As applied to business activities, the police power is the power to regulate those activities, not to engage in carrying them on. P. 369.
7. Whether the word "person" or "corporation" as used in a statute includes a State or the United States depends upon the connection in which the word is found. P. 370.
8. As used in 26 U.S.C., § 205, which imposes a tax upon every person who deals in intoxicating liquors, the word "person" is *held* to include a State, either under the statutory extension of the word to include a corporation (26 U.S.C., § 11) or without regard to such extension. P. 371.

Motion denied.

THIS was a motion by the State of Ohio for leave to file a bill of complaint invoking the original jurisdiction of this Court. The State was seeking to enjoin the enforcement against it of federal statutes imposing taxes upon dealers in intoxicating liquors.

Mr. John W. Bricker, Attorney General of Ohio, *Mr. William S. Evatt,* and *Mr. Isadore Topper,* Assistant Attorney General, were on the brief for Ohio.

The right of a State to institute an original action in this Court against citizens of another State is granted in Art. III, § 2, of the Federal Constitution.

The right of a State to prosecute a suit in injunction has been recognized by this Court. *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230; *Florida* v. *Mellon,* 273 U.S. 12.

This is an action arising from extraordinary and exceptional circumstances.

If an individual may enjoin the collection of a federal tax in the District Court under certain circumstances, *Regal Drug Corp.* v. *Wardell,* 260 U.S. 386; *Hill* v. *Wallace,* 259 U.S. 44; *Miller* v. *Standard Nut Margarine Co.,* 284 U.S. 498; a State may enjoin such collection under like circumstances in this Court.

In the operation of complainant's Department of Liquor Control, the State is performing a purely governmental function, an exercise of its police power.

It is difficult to conceive of a function at the present time more directly designed for the protection of the public health, safety, welfare and morals than the control of the liquor traffic, and hence more directly and exclusively a purely governmental function. *Plumb* v. *Christie,* 103 Ga. 686; *Dispensary Comm'rs* v. *Thornton,* 106 Ga. 106.

It is submitted that when a State, in the exercise of its police power, for the purpose of controlling the liquor traffic, prohibits the private business of wholesaling and retailing by the package of spirituous liquor, and itself takes over that function for the protection of its citizens from unscrupulous liquor dealers and bootleggers, it is performing a most vital governmental function. This, plaintiff contends, has always been true, but it is now doubly true in view of America's experience during the last fifteen years.

The adoption of the Eighteenth Amendment, followed by the adoption of the Twenty-first Amendment, has indisputably placed plaintiff's operation of its Department of Liquor Control in the category of a governmental function.

The federal statutes do not levy a tax against a State which sells and distributes intoxicating liquor.

In construing a statute, words are taken in their ordinary sense unless from the whole context a different meaning was intended. Giving to the term " person " its broad and commonly understood meaning, § 11 (R.S., § 3140) deals with individuals, associations, co-partnerships and corporations, since a State is not a person within the ordinary or legal definition of that word. *United States* v. *Fox,* 94 U.S. 315, 321; *In re Fox,* 52 N.Y. 530; *Lowenstein* v. *Evans,* 69 Fed. 908. See also, *McBride* v. *Board of Comm'rs,* 44 Fed. 17, 18; *Berton* v. *All Persons,* 176 Cal. 610.

It is also to be noted that Congress did not include within the definition of the word " person," as contained in 26 U.S.C., § 11 (R.S., § 3140), the phrase " body corporate or politic." Even if that phrase had been used, it would not include a State. *Des Moines* v. *Harker,* 34 Iowa 84; *Lowenstein* v. *Evans,* 69 Fed. 908, 911.

A State, accurately speaking, is not a corporation, since the State is self-existing, whereas a corporation is an entity created by a State. The failure of Congress to include the States in the definition of the term " person " could not have been inadvertent, since the States are not commonly thought of as persons. *Davis* v. *Pringle,* 1 F. (2d) 860, 863; *Mayrehofer* v. *Board of Education,* 89 Cal. 110.

This is not an action against the United States.

Defendants have no authority to assess and collect a tax against the State. This is an action to enjoin defendants from committing acts under color of office which are neither authorized by the statutes of the United States nor by its Constitution. *Philadelphia Co.* v. *Stimson,* 223 U.S. 605.

The inevitable result of taxing this state instrumentality is to interfere with and destroy it, thereby returning to the Federal Government the power to prohibit the business, a power expressly taken away by the Twenty-first Amendment.

The Court is not here concerned with the destruction by a State of a "preëxisting right of taxation possessed by the Government of the United States," *Murray* v. *Wilson Distilling Co.*, 213 U.S. 173,—this for the reason that the United States has not for the past fifteen years had any right to tax the liquor business here under consideration, it having been during that interval prohibited; furthermore, since the adoption of the Twenty-first Amendment any right to tax this business is dependent, in the first instance, upon the State permitting the business to be conducted. To the extent that a State, since the Twenty-first Amendment, authorizes a return of this business by private individuals, to that extent is the right of the Federal Government to tax conferred.

There is no question here of interference with or danger to the sources of federal revenue. The liquor traffic has become primarily a problem of welfare, health and morals; it is no longer a problem of revenue. Revenue has become purely secondary. This traffic ceased to be a revenue traffic upon the adoption of the Eighteenth Amendment, and the Twenty-first Amendment did not return it to this category in States which adopt a state monopoly.

The case of *South Carolina* v. *United States*, 199 U.S. 437, is not inconsistent with plaintiff's position. The Court had before it a dispensary system established by the State of South Carolina in 1895, primarily for revenue, which was materially different from that presented in the present case. Under the South Carolina law, the dispensaries were operated by a dispenser licensed by a county board of control. Under the Ohio law, the state-owned stores are operated by civil service employees of the state government. In the present case, instead of being concerned with a matter of taxing natural persons who were licensed by the State, we are concerned with the matter of the taxation of the State itself. The two cases are clearly distinguishable.

It is pertinent to note that although this *South Carolina* case has since been cited by this Court, it has been cited only as authority for the principle that a private business enterprise of the State, as distinguished from a governmental function, may be taxed by the Federal Government. In no single case has this Court cited the case as authority for the proposition that the exercise of a state monopoly of the liquor business is a private business and not the performance of a governmental function.

Solicitor General Biggs, Assistant Attorney General Wideman, and *Messrs. James W. Morris, M. H. Eustace,* and *Charles Bunn* were on the brief for defendants.

The cause is not within the original jurisdiction of this Court, because four of the defendants are citizens of the plaintiff State.

Injunction will not lie to restrain the collection of a federal tax. Section 3224, Revised Statutes, has been uniformly applied even where it appears that the tax is illegal or unconstitutional. To make this section inapplicable there must exist special and extraordinary circumstances, which do not exist in this case.

The Government has provided a complete system of corrective justice in the administration of its revenue laws, which is founded upon the idea of appeals within the executive departments, where, if the party aggrieved can not obtain satisfaction, there are provisions for recovering the tax after it is paid, by suit against the collecting officer, or against the United States. Complainant has an adequate remedy at law by paying the tax and suing for its recovery.

The tax which is challenged is one provided for the operation of the general Government. The defendants have no personal interest in the collection of the tax. The acts complained of are the acts of the defendants in their official capacities, done under color of their offices in the performance of an official duty. Hence the United States is the real party in interest, and it can not be sued without its consent.

The merits have already been decided against plaintiff's contention. *South Carolina* v. *United States,* 199 U.S. 437; *Board of Trustees* v. *United States,* 289 U.S. 48.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Upon the motion of complainant for leave to file a bill of complaint invoking the original jurisdiction of this court, a rule was issued directing the defendants to show cause why such leave should not be granted. Defendants, by their return to the rule, oppose the motion upon the ground, among others, that the merits have been conclusively settled against complainant by prior decision of this court.

The bill alleges that the defendant Helvering is Commissioner of Internal Revenue, and that the other defendants are collectors of internal revenue in the several internal revenue districts in the State of Ohio; that on December 22, 1933, the state legislature passed an act providing a system of control for the manufacture, sale and importation of, and traffic in, beer and intoxicating liquors within the state, and creating a state monopoly for the distribution and sale of all spirituous liquors under a department of liquor control; that the state has purchased intoxicating liquors at a cost of more than $4,500,000 for sale to permit-holders and to the public through its state stores, each of which will be entirely and exclusively state owned, managed and controlled; that the state is about to open in the various counties one hundred and eighty-seven such state liquor stores; that defendants have threatened to, and unless enjoined by this court will, levy and collect excise taxes on the agencies and operations of the state in the conduct of its department of liquor control, and enforce against the state, its officers, agents and employees, penalties for nonpayment of taxes imposed by § 3244, R.S. (U.S.C., Title 26, § 205), and other designated statutes of the United States; that complainant is not subject to these statutes and is immune from any tax imposed thereby; and that the acts of Congress which impose such taxes do not by their terms include a state, or its officers or employees, and were not intended to do so. It is further alleged that the circumstances of the case are extraordinary and exceptional in several respects, among them being that the attempt is to tax a sovereign state; and it, therefore, is contended that the equity power of the court is properly invoked under the principles stated in *Hill* v. *Wallace,* 259 U.S. 44, 62.

The state act deals with the subject in great detail; but for present purposes the provisions set forth in the bill to which we have just referred are all that require consideration.

The provisions of the federal statutes, so far as necessary to be stated, follow:

U.S.C., Title 26, § 205 (R.S., § 3244, as amended):

"(a) *Retail liquor dealers.*—Retail dealers in liquor shall pay $25. Every person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors otherwise than as hereinafter provided in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors.

"(b) *Wholesale liquor dealers.*—Wholesale liquor dealers shall each pay $100. Every person who sells, or offers for sale foreign or domestic distilled spirits, wines or malt liquors, otherwise than as hereinafter provided in quantities of not less than five wine gallons at the same time shall be regarded as a wholesale liquor dealer."

U.S.C., Title 26, § 11 (R.S., § 3140):

". . . where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

Putting aside various preliminary questions raised by defendants (compare *Ex parte Bakelite Corp.*, 279 U.S. 438, 448; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 553), we pass at once to the fundamental question involved in the state's challenge to the validity of the tax. That challenge seeks to invoke a principle, resulting from our dual system of government, which frequently has been announced by this court and is now firmly established,—that "the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are . . . exempt from taxation by the United States." *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 575; *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *Collector* v. *Day*, 11 Wall. 113; and other cases cited in *Trinityfarm Construction Co.* v. *Grosjean*, 291 U.S. 466. But, by the very terms of the rule, the immunity of the states from federal taxation is limited to those agencies which are of a governmental character. Whenever a state engages in a business of a private nature it exercises nongovernmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress. This court, in *South Carolina* v. *United States*, 199 U.S. 437, a case in no substantial respect distinguishable from the present one, definitely so held. Compare *Board of Trustees* v. *United States*, 289 U.S. 48, 59.

The *South Carolina* case arose under a state statute, which, like the one at bar, created a monopoly and prohibited the sale of intoxicating liquors except at dispensaries to be operated by the state. This court, while sustaining the validity of the statute and fully accepting the rule that the national government was without power to impose a tax in any form which had the effect of prohibiting the full discharge by the state of its governmental functions, held that " whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation." The decision sustained the identical tax provisions involved in the present case, and, therefore, we follow it as controlling.

A distinction is sought in the fact that after that case was decided the Eighteenth Amendment was passed, and thereby, it is contended, the traffic in intoxicating liquors ceased to be private business, and then with the repeal of the amendment assumed a status which enables a state to carry it on under the police power. The point seems to us altogether fanciful. The Eighteenth Amendment outlawed the traffic; but, certainly, it did not have the effect of converting what had always been a private activity into a governmental function. The argument seems to be that the police power is elastic and capable of development and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. *Rippe* v. *Becker*, 56 Minn. 100, 111–112; 57 N.W. 331. If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto,* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned. Compare *Georgia* v. *Chattanooga,* 264 U.S. 472, 480–483; *U.S. Bank* v. *Planters'*

Bank, 9 Wheat. 904, 907; *Bank of Kentucky* v. *Wister*, 2 Pet. 318, 323; *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, 323–325; *Curran* v. *Arkansas*, 15 How. 304, 309.

We find no merit in the further contention that a state is not embraced within the meaning of the word "person," as used in U.S.C., Title 26, § 205 and defined in § 11, *supra*. By § 205 the tax is levied upon every "person who sells, etc."; and by § 11 the word "person" is to be construed as meaning and including a partnership, association, company or corporation, as well as a natural person. Whether the word "person" or "corporation" includes a state or the United States depends upon the connection in which the word is found. Thus, in *Stanley* v. *Schwalby*, 147 U.S. 508, 517, it is said that the word "person" in the statute there under consideration would include the United States as a body politic and corporate. See also *Giddings* v. *Holter*, 19 Mont. 263, 266; 48 Pac. 8; *State* v. *Herold*, 9 Kan. 194, 199. A state is a person within the meaning of a statute punishing the false making or fraudulent alteration of a public record "with intent that any person may be defrauded." *Martin* v. *State*, 24 Tex. 61, 68. Under a statute defining a negotiable note as a note made by one person whereby he promises to pay money to another person, and providing that the word "person" should be construed to extend to every corporation capable by law of making contracts, it was held that the word included a state. *Indiana* v. *Woram*, 6 Hill (N.Y.) 33, 38. And a state is a person or a corporation within the purview of the priority provisions of the bankruptcy act.* *In re Western Implement Co.*, 166 Fed. 576, 582.

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* U.S.C., Title 11, § 104 (b)(5)—"debts owing to any person who by the laws of the States or the United States is entitled to priority." This construction is explicitly adopted by the amendment of May 27, 1926, c. 406, § 15, 44 Stat. 666; U.S.C., Supp. VII, Title 11, § 104 (b)(7).

Compare *In re Jensen*, 59 N.Y.Supp. 653, 655; *Bray* v. *Wallingford*, 20 Conn. 416, 418; *County of Lancaster* v. *Trimble*, 34 Neb. 752, 756; 52 N.W. 711; *Rains* v. *City of Oshkosh*, 14 Wis. 372, 374; 1 Black. Comm. 123.

In the *South Carolina* case this court disposed of the question by holding that since the state was not exempt from the tax, the statute reached the individual sellers who acted as dispensers for the state. While not rejecting that view, we prefer, in the light of the foregoing examples, to place our ruling upon the broader ground that the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a "person" under the statutory extension of that word to include a corporation, or as a "person" without regard to such extension. The motion for leave to file the bill of complaint, accordingly, is

Denied.

MR. JUSTICE STONE concurs in the result.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, v. INDEPENDENT LIFE INSURANCE CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 689. Argued April 4, 1934.—Decided May 21, 1934.

1. A federal tax upon part of a building occupied by the owner, or upon the rental value of the space, is a direct tax and invalid unless apportioned. P. 378.
2. The rental value of a building used by the owner does not constitute income within the meaning of the Sixteenth Amendment. P. 379.
3. In computing the net income of life insurance companies under the Revenue Acts of 1921 and 1924, deductions for taxes, expenses, and depreciation, in respect of real estate owned and occupied in whole or in part by the taxpayer, are not permitted unless there be